Volume 53 | Issue 1 Article 9

December 1950

Mines and Minerals--Strip Mining Rights--Construction of Lease

T. N. C.
West Virginia University College of Law

Court by the district courts when hearing the habeas corpus application of a person detained under state custody. While this point was not squarely before the court, it would have been well for it to take a stand on that issue in view of the recent holding in *Stonebreaker v. Smyth,* 163 F.2d 498 (4th Cir. 1947). This court held that although a denial of certiorari by the United States Supreme Court is not res judicata upon one subsequently filing for habeas corpus in the district court, yet it is a matter to be taken into consideration by the district court and in the absence of some unusual situation is sufficient reason for that court to deny the writ of habeas corpus. In this case the court in effect gave a denial of certiorari substantially the same weight as if the case had been heard by the Supreme Court on its merits. Thus the clear right of the prisoner to the great writ of freedom was lost and the result of the case unjustified as the court failed to apply, although it considered, the settled rule that a denial of certiorari has no legal significance. *House v. Mayo,* 324 U.S. 42 (1945).

S. F. B.

MINES AND MINERALS—STRIP-MINING RIGHTS—CONSTRUCTION OF LEASE.—*P* purchased for $5,615 the surface of 265 acres of land and leased to *D,* owner of an underlying twelve-acre tract of coal, the strip-mining rights for $3,000. The lease gave *D* the right "to do any and all acts which are *necessary or convenient* for the mining and removal of all said coal, and by way of enlargement . . . the further right to mine, remove, and market all of said coal . . . without any liability whatsoever from damages that may arise from the removal of any or all of said coal, or the surface or subsurface or other strata overlying the same, or such additional parts of said surface as may be *necessary or convenient* in connection therewith . . . ." (Italics supplied.) In a suit by *P* for an injunction and damages for the conversion of ten truck loads (fifty tons) of soil, stone and shale which *D* took from the premises to construct a roadway or ramp to his tipple which was located off the leased premises, the lower court rejected *D*'s contention that the taking was authorized by the contract. *Held,* that the money payment evidences consideration for very broad mining rights. Thus the materials removed from the premises for the purpose of constructing a road or ramp

were necessary and convenient to *D*'s strip-mining operations within the terms of the agreement. Reversed. *Stone v. Gilbert,* 56 S.E.2d 201 (W. Va. 1949)

The right of the operator, under the terms of the lease, to remove the soil from the leased premises to another tract not covered by the lease, was considered by the court in the instant case to be the "single basic question" before it, although it recognized that another ground for reversal was present. The case presents a problem of construction as to the use of surface materials under a clause in a strip-mining lease allowing the operator to do all acts necessary or convenient in the mining and removal of coal.

A fundamental rule of construction applicable to contracts is that where the terms of a written instrument are clear and unambiguous full force and effect should be given to the language used. *Strother v. National Bank,* 113 W. Va. 75, 166 S.E. 818 (1932); *Bruen v. Thaxton,* 126 W. Va. 330, 28 S.E.2d 59 (1943) (as applied to a deed); *Griffin v. Coal Co.,* 59 W. Va. 480, 53 S.E. 24 (1905) (deed to coal together with mining rights). Where strip mining is involved, a rule not present in the above cases must be considered. "But certainly enactments with the plain purpose of rigidly controlling strip mining demand of the Court a *strict construction of instruments upon which that practice is based.* A liberal construction would be plainly contrary to the declared public policy. . . ." *West Virginia-Pittsburgh Coal Co. v. Strong,* 129 W. Va. 832, 844, 42 S.E.2d 46, 53 (1947) (italics supplied). See also *Tokas v. Arnold Co.,* 122 W. Va. 613, 11 S.E.2d 723 (1940), and W. VA. CODE c. 22, art. 23, § 1, and c. 19, art. 21a (Michie, 1949) (relating to strip mining and soil conservation).

While the facts may vary from those in the principal case the result reached in cases construing the rights of a mining lessee as to the use of surface materials generally require that materials be used on the leased premises, in the absence of express terms to the contrary. Thus, where a lease gave the lessee the right to use the timber on the land, the West Virginia court held it must be construed as intending only such use as may be necessary to effectuate the purpose of the demise and could not be sold. *Paxton Lumber Co. v. Panther Coal Co.,* 83 W. Va. 341, 98 S.E. 563 (1919). Nor can the timber be used on adjacent property operated by the lessee for the mining of coal. *Carmichael v. Old Straight Creek Coal Corp.,* 232 Ky. 133, 225 S.W.2d 572 (1929). By-products resulting from the mining process have been held to be a part of the corpus of the

estate, and cannot be removed by the lessee. *Doster v. Friedensville Zinc Co.*, 140 Pa. 147, 21 Atl. 251 (1891). Also, it has been held that the lessee of a sand and gravel pit cannot remove the top soil from the premises. *Wolfe v. Licking Gravel Co.*, 71 Ohio App. 172, 48 N.E.2d 254 (1943). Perhaps, the courts in limiting the mining lessee's use of surface materials to the leased premises, unless a contrary right is expressly granted, are carrying over the rule of landlord-tenant that a tenant for years has, in the absence of a stipulation or license allowing him to do so, no right to take clay, gravel, soil, and the like, unless such material was one of the recognized profits of the land before the commencement of his tenancy. 1 TIFFANY, LANDLORD & TENANT § 109 (4) (1912).

The point of difference between the above cases and the principal case is that in the instant case the use off the premises was viewed by the West Virginia court as necessary and convenient to the operations on the premises while in the above cases the contemplated use off the premises bore no relation to the operations on the premises. The case of *Sun Lumber Co. v. Nelson Fuel Co.*, 88 W. Va. 61, 106 S.E. 41 (1921), sheds some light on what the West Virginia court considers a use of surface materials necessary to the mining operations on the premises. There the lease gave the lessee the right to use so much timber as was required to mine and remove the minerals from the land. In holding that this lease did not confer the right to use said timber to build miners' houses on the premises, the court indicated that to be "reasonably necessary" the use of the substance of the inheritance must be directly connected with the mining and removing of the coal, not just the lessee's business as a coal operator, and further, that the use of materials be within the contemplation of the parties. At 71, 106 S.E. at 45.

In light of the points raised above, it is arguable that a contrary result should have been reached on this phase of the principal case. Viewing the following points in the light of our legislative policy to construe strictly instruments upon which strip-mining rights are based, it could be argued first that more than general terms are necessary to give the lessee the right to remove surface materials from the premises and deposit them elsewhere. Second, within the view of *Sun Lumber Co. v. Nelson Fuel Co., supra,* such use off the premises in the instant case was not within the contemplation of both parties. "However general the terms may be in which an instrument is conceived it only comprehends those things in respect to which it appears that the contracting parties proposed to con-

tract and not others they never thought of." *Doster v. Friedensville Zinc Co., supra.* Third, by allowing the lessee to use surface materials to build a roadway or ramp to a tipple located off the leased premises, on the ground that it is necessary to the mining operations within the terms of the lease, the court in no way limits the use of the tipple to the operation on the leased premises, thereby allowing the lessee to do indirectly what he could not do directly. In the absence of an express agreement a coal lessee cannot use the *surface* owned by his grantor or lessor in producing, cleaning, marketing, or in any way handling coal produced on the lands of another. Mining privileges and rights contained in a lease or deed relate to coal to be produced from the land covered by the instrument and none other. *Marlowe v. Marcum,* 294 Ky. 405, 171 S.W.2d 997 (1943); *Schmidt v. Schmidt,* 284 Ill. App. 623, 1 N.E.2d 419 (1936); *Moore v. Lackey Mining Co.,* 215 Ky. 71, 284 S.W. 415 (1926). For a discussion of West Virginia cases see Donley, *Coal Mining Rights and Privileges in West Virginia,* 52 W. VA. L. REV. 32, 47 (1949).

In failing to restrict the lessee's use of surface materials to use on the leased premises under a clause permitting the lessee to do all that is necessary or convenient in the mining and removal of coal thereunder, the West Virginia Supreme Court of Appeals has, in effect, said the exercise of this right cannot be limited to the narrow confines of the leasehold premises, but leaves undefined the extent to which the lessee may go, short of wilful and unnecessary waste. It does not limit the amount of surface materials that can be taken, nor the distance they may be hauled, nor the tipple's use to the processing of coal produced from under the leased premises only, but merely that the tipple be used for the purpose for which the premises were leased. In a concurring opinion based upon other grounds Judge Fox said of the point under discussion: "In my opinion, the mining rights granted were intended to be exercised only on the leased premises. . . . on the principle herein announced, I do not see how a line can be drawn between fifty tons removed for a short distance only, and five hundred tons removed for five miles or more, provided the removal is necessary to effect the paramount purpose for which the lease was executed." At 206.

However, the question is really one of degree, to be decided upon the facts of each case; and the court will probably not tolerate

unreasonable removal of the surface even under the terms of a grant as broad as the one interpreted in the instant case.

T. N. C.

MUNICIPAL CORPORATIONS—LIABILITY FOR MAINTENANCE OF STREETS AND SIDEWALKS—MEANING OF STATUTE A JURY QUESTION.—Action against defendant city to recover damages for personal injuries alleged to have been sustained by reason of a defect in a sidewalk which made the sidewalk "out of repair" within the meaning of W. VA. CODE c. 17, art. 10, §17 (Michie, 1949), which gives a right of action to "any person who sustains an injury to his person or property by reason of . . . any street or sidewalk or alley of any incorporated city, town or village, being out of repair." Defendant contends that the defect described, a difference in elevation between two concrete sidewalk sections of one and a quarter inches, did not render the sidewalk out of repair within the meaning of the statute, as a matter of law. *Held,* that whether the defect rendered the sidewalk out of repair in the sense of the statute was a question for the jury, since it is such that a jury may reasonably infer that it was not safe for travel with ordinary care, in the ordinary modes, by day or by night. *Smith v. Bluefield,* 55 S.E.2d 392 (W. Va. 1949). Affirmed. (3-2 decision).

Liability under the statute does not depend on negligence of the city in keeping the sidewalk in repair, but is absolute. *Chapman v. Milton,* 31 W. Va. 384, 7 S.E. 22 (1888). But the absoluteness referred to is not insurance liability for any slight defects. The street or sidewalk must first be found to be out of repair within the meaning of the statute. *Yeager v. Bluefield,* 40 W. Va. 484, 21 S.E. 752 (1895). The rule formerly was that where there is no conflict in the evidence as to the existence and extent of the obstruction, it is a question of law as to whether the obstruction was such as to render the street not in a reasonably safe condition within the meaning of the statute. *Taylor v. Huntington,* 126 W. Va. 732, 30 S.E.2d 14 (1944).

A raised place in a sidewalk one and a half inches high in the center was held not sufficient to render a city liable for injuries received by a pedestrian who fell thereon when the place was rendered slippery by snow and ice and children coasting thereon.